MBF CAPITAL BHD & ANOR

v.

DATO' PARAM CUMARASWAMY

HIGH COURT MALAYA, KUALA LUMPUR
ZAINUN ALI JC
[CIVIL SUIT NO: S3-23-68-1996]
28 JUNE 1997

INTERNATIONAL LAW: *Diplomatic and consular law - Diplomatic immunity - United Nations Special Rapporteurs - Status and mandate of - Whether 'experts on special missions' - Whether entitled to privileges and immunities accorded to experts performing missions for the United Nations - Whether immune from legal process of any kind - Jurisdiction of Malaysian Courts - Whether ousted - Convention on the Priveleges and Immunities of the United Nations 1946, ss. 22, 23, 34 - Diplomatic Priveleges (United Nations and International Court of Justice) Order 1949, art. 12 - International Organisation (Privileges and Immunities) Act 1992, s. 7(1)*

CONSTITUTIONAL LAW: *Courts - High Court - Jurisdiction - Suit against Special Rapporteurs of the United Nations - Whether Special Rapporteurs protected by immunity - Whether Court seised of jurisdiction to hear suit - Courts of Judicature Act 1964, s. 23 - Convention on the Privileges and Immunities of the United Nations 1946, ss. 22, 23, 34*

This was an application by the defendant to strike out the plaintiffs' writ on the ground that the Court had no jurisdiction to entertain the plaintiffs' action. The facts were that on 2 April 1994 the defendant, an advocate and solicitor, was appointed as the United Nations Special Rapporteur on the Independence of Judges and Lawyers for a period of 3 years. The plaintiffs alleged that the defendant, through an article published in the International Commercial Litigation Magazine in 1995, had spoken defamatorily of them, and in the event instituted a writ action against the defendant claiming damages for libel and slander. The defendant claimed that the Court is not seised of jurisdiction to hear the libel suit as immunity attaches to him by virtue of s. 22 of the Convention on the Priveleges and Immunities of the United Nations 1946 ('the Convention') as well as Article 12 of the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949.

It was not in dispute that the Convention was acceded to by Malaysia, and that s. 22(b) thereof accorded Special Rapporteurs such as the defendant immunity from legal process for words spoken or written by them in the course of their mission. It was also not in dispute that soon after the suit was filed, the Secretary-General of the United Nations had issued a Certificate

which affirmed the immunity in question and determined that the impugned words as spoken by the defendant were spoken in the course of his mission. These apart, the Minister of Foreign Affairs, Malaysia, had also issued a Certificate under s. 7 of the International Organisations (Privileges and Immunities) Act 1992, endorsing the defendant's status and mandate as a Special Rapporteur.

The plaintiffs argued that the defendant's mandate is functional and limited in nature and that immunity could only attach to him so long as he performed his duties within the scope of his mandate. It was further argued that by so making the alleged defamatory statement to a private litigation magazine herein, the defendant had clearly acted outside his mandate and was not therefore entitled to immunity.

Held:

[1] It is common ground that in so far as the defendant is concerned, he is, as a Special Rapporteur to the United Nations, construed and styled as an "expert on mission". This being the case, it is pivotal to this application to ascertain the extent of the immunity afforded to experts on mission under s. 22 of the Convention.

[1a] The International Court of Justice ('the ICJ'), in its deliberation in the *Mazilu* case, has observed that, while experts on mission enjoy, in accordance with s. 22, the privileges and immunities necessary for the exercise of their functions, such privileges and immunities are not accorded 'anywhere and everywhere'. This observation accords with contemporary thinking that the doctrine of absolute immunity is *passe*. In fact, as shown by case laws, what has emerged is that the restrictive theory holds the field.

[2] The Certificate of the Secretary-General stands viewed as an opinion and has no more probative value than a document which appears wanting in material particulars. It would indeed be a naive supposition if it is to be construed as being conclusive. Likewise, the Minister's certificate appears to be no more than a bland statement as to a state of fact pertaining to the defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation. The authorities show that the State merely transmits the claim for immunity, leaving it to the Court to examine the truth of the allegation of facts on which it was based.

[3] The question of whether the defendant's act is within scope or not is an elusive inquiry, to be answered only when matters of evidence is before this Court. The Court however is not shackled by any constraint

and it is open for it to examine the question of its jurisdiction to decide the matter. It is axiomatic, however, that the defendant's immunity hangs very much on the nature of the act and not on its purpose.

[4] Jurisdiction is the right of the Court to enter upon the inquiry as to whether or not a cause of action exist in the plaintiffs' writ and if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief. A Court may lack jurisdiction on any one of the four grounds as stated by Lord Diplock in *Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong.*

[4a] In as much as immunity is imputed to the Organisation in cases where officials or experts of the Organisation are concerned, it is equally relevant that the person of the defendant determines the fate of his application. It would therefore appear that whether the defendant as a Special Rapporteur of the United nations is entitled to so claim immunity would consequently determine whether this Court lacks jurisdiction or otherwise.

[4b] On the facts, this Court is unable to hold that the defendant is absolutely protected by the immunity he claims. The facts as placed before this Court clearly do not oust the jurisdiction of the Court. Section 23 of the Courts of Judicature Act 1964 also invests this Court with jurisdiction since the criterion for residence and place of business, as well as the facts on which the proceedings are based, occured within this Court's jurisdiction.

[Application dismissed.]

Cases referred to:
Thai-Europe Tapioca Service Ltd v. Government of Pakistan [1975] 1 WLR 1485 ***(refd)***
R v. Madan [1961] 2 QB 1 ***(refd)***
Dickinson v. Del Solar [1930] 1 KB 376 ***(refd)***
Duff Development Co Ltd v. Kelantan Government [1924] AC 797 ***(refd)***
The Parliament Belge [1880] 5 PD 197 ***(refd)***
Engelke v. Mussman [1928] AC 433 ***(refd)***
Rediffusion (Hong Kong) Ltd v. Attorney-General of Hong Kong [1970] AC 1136 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23
Rules of the High Court 1980, O. 12 r. 7

Other sources referred to:

Convention on the Privileges and Immunities of the United Nations 1946, ss. 2, 22, 23

Diplomatic Privileges (Vienna Convention) Act 1966

Diplomatic Privileges (United Nations and International Court of Justice) Order 1949, art. 12

International Court of Justice, Advisory Opinion on the Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations

International Organisation (Privileges and Immunities) Act 1992, s. 7(1)

Satow's Guide to Diplomatic Practice, 5th Edn., 1979

For the plaintiffs - Dato' VK Lingam (Dato' V Sivaparanjothi, Satchithanandhan, Peter Raj, R Thayalan with him); M/s V Siva & Partners

For the defendant - Dr Cyrus V Das (Nantha Balan, Trevor George De Silva with him); M/s Shook Lin & Bok

JUDGMENT

Zainun Ali JC:

This application by the defendant to set aside and/or strike out the plaintiffs' writ, burgeons with issues of exceptional interest and considerable importance.

It started off with the plaintiffs' action for defamation against the defendant, arising out of an article which appeared in the November 1995 issue of the International Commercial Litigation Magazine (hereinafter referred to as 'the magazine'), under the caption "Malaysian Justice On Trial".

The said Article is annexed hereby and marked as Appendix A. The particulars of the said defamatory words are as appended below:

> In answer to questions from the said representatives about the cases in which Dato' VK Lingam represented the plaintiffs in their case against the East Asiatic Company ('EAC'), Insas Bhd. and Megapolitan Nominees Sdn. Bhd. against the Ayer Molek Company Bhd., Tan Sri Dato' Vincent Tan Chee Yioun against the publishers of the Malaysian Industry and others, and Berjaya Industrial Bhd. and Berjaya Corporation (Cayman) Limited against CS First Boston; and about the alleged abuse of judicial procedures and/or about the alleged corruption of the judiciary by Dato' VK Lingam in connivance with his clients in those cases, the defendant said:
>
> > This case looks like a very obvious, perhaps even glaring, example of Judge-choosing.
> >
> > It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending.

> I do not think that Malaysia would be able to repeat the result when its system of justice was ranked at the beginning of 1995 by the World Economic Forum in the top 25 systems in the world on the basis of replies by major companies in Malaysia, when asked what level of confidence they had in the justice system in the country in which they were located.
>
> Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice. But I do not want any of the people involved to think I have yet made up my mind.
>
> Although these complaints only really came to prominence because of the Judge-choosing allegations in the Ayer Molek affair, people first started to question the integrity of the judiciary after the RM10 million (RM4 million) libel award which Vincent Tan received on 22 October last year.

It is the plaintiffs' case that the defendant had spoken to one David Samuels a staff writer of the magazine who had caused publication of the impugned article in the magazine concerning the plaintiffs and concerning them in the way of their business in relation to their conduct therein. The plaintiffs' claim that the said article had gravely and seriously injured them in their trading reputation and have brought them into public scandal, odium and contempt.

The 1st plaintiff is a listed company on the Kuala Lumpur Stock Exchange whilst the 2nd plaintiff is a licensed stock broking company.

The defendant is an advocate and solicitor of the High Court of Malaya and the Chief Executive and Partner of Messrs. Shook Lin & Bok, an established firm of advocates and solicitors in Malaysia.

It is the plaintiffs' case that the defendant had published or caused re-publication of the said defamatory words or their gist in the magazine.

The plaintiffs contended that further and in the alternative, that the defendant had caused and/or participated in the publication of the whole of the said article.

Thus based on a series of facts and matters in support, the 1st plaintiff's claim as against the defendant is for damages amounting to RM15 million, including exemplary damages for slander.

The 2nd plaintiff's claim as against the defendant is for damages amounting to RM15 million including exemplary damages for slander.

As regards libel, both the 1st and 2nd plaintiffs' claim as against the defendant is for RM15 million each, including exemplary damages for libel and in addition both the 1st and 2nd plaintiffs claim interest at the rate of 8% per annum on the sum of damages awarded on both claims adverted to above, from the date of judgment to date of full realisation.

The plaintiffs also claim for an order of injunction to restrain the defendant whether by himself, his servant or agent or otherwise howsoever from further speaking or publishing or causing to be published the said or any similar words defamatory of the plaintiffs.

The defendant's case is that the statement attributed to him in the magazine were made in his capacity as a United Nations Special Rapporteur on the Independence of Judges and Lawyers and that it was made in the course of his mission as such. On that score, the defendant claims he is immune from legal process of every kind and that therefore this Court has no jurisdiction to hear the plaintiffs' action.

Upon publication of the said article, M/s. V. Siva & Partners on behalf of the plaintiffs wrote to the defendant on 26 February 1996 expressing concern over the alleged defamatory words in the magazine and made proposals to lessen the plaintiffs' mortification.

This was met with a reply from M/s. Shook Lin & Bok in a letter dated 1 March 1996, which informed the plaintiffs' solicitors regarding the status of the defendant as a United Nations Special Rapporteur. Thus the plaintiffs were put on notice that when the defendant made the statement it was in his capacity as such and so this necessarily precludes him from being sued for defamation, as he is protected with immunity.

With admirable alacrity, the Centre for Human Rights of the United Nations Office at Geneva wrote to the plaintiffs' solicitors asserting the defendant's immunity from legal process under s. 22 of the Convention on the Privileges and Immunities of the United Nations 1946 ('the Convention').

It would be pertinent to state what s. 22 of the Convention contains. It reads:

> Section 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) Inviolability for all papers and documents;

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Further the defendant takes the view that as a matter of fact the act complained of was of such a nature as brought him within the protective cloak of immunity by virtue of his mandate as well as under Article 12 of the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 ('the 1949 Order').

The Convention was adopted by the General Assembly of the United Nations on 18 February 1946 and acceded to by Malaysia on 28 October 1957.

By acceding to the Convention, Malaysia has incorporated the terms thereof. This obligation was given statutory footing as expressed in the Diplomatic Privileges (Vienna Convention) Act 1966 and the International Organisations (Privileges and Immunities) Act 1992.

It is imperative that the position of the defendant is properly ascertained.

The defendant was appointed as a UN Special Rapporteur for a three year period, pursuant to a letter dated 2 April 1994, issued by the chairman of the Commission on Human Rights (see BP p. 169).

The defendant's mandate is in essence, spelled out as follows:

(a) to inquire into any substantial allegations transmitted to him or her and to report his or her conclusions thereon;

(b) to identify and record not only attacks on the independence of the judiciary, lawyers and Court officials but also progress achieved in protecting and enhancing their independence and make concrete recommendations including recommendations for the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

The defendant's mandate is also clearly stated in the Certificate under s. 7(1) of the International Organisation (Privileges and Immunities Act) 1992, given under the hand of the Minister of Foreign Affairs, which will be referred to in due course.

The defendant's claim that immunity attaches to him, and that therefore this Court has no jurisdiction as against him in the writ, would necessitate a brief on the position of a United Nations Special Rapporteur.

Although literature on this subject does not seem prolific, one that can be relied on is the work of Henry G. Schermers and Niels M. Blokker, where it is stated that:

> Secondary organs report to a superior organ. They often appoint a rapporteur to prepare reports on the basis of their discussions. In such a report, recommendations are made to the superior organ and usually also explained ...

In *Satow's Guide to Diplomatic Practice* (5th Edn. 1979) it is illustrated that:

> ... his functions as a "rapporteur" are to summarise the discussions in the form of a report showing the conclusions arrived at by the committee in the matter. This report which is first submitted to the members of the committee is then communicated by him to the plenary body and he is the mouthpiece of the committee in placing their decision before that body. And similarly in the case of a sub-committee which has been appointed to report to the committee itself.

Thus far, it appears that there is more than a semblance of a works ethics involving rapporteurs. This is relevant, for it is contended by the plaintiffs that the defendant had departed from the straight and narrow path of reporting to the Commission as envisaged by the mandate given to him, when he spoke to David Samuels of the magazine.

It is the plaintiffs' case that the defendant's mandate is a functional, limited and a qualified one in its scope; that for as long as he performs his duties and functions **within the scope** of his mandate, he enjoys the privileges and

immunities under s. 22 of the Convention. It is further contended by the plaintiffs that by so making the alleged defamatory statement against the plaintiffs to a private commercial litigation magazine, the defendant had clearly acted outside his mandate and therefore not entitled to immunity.

The matter seems further exacerbated since the defendant had yet to complete his findings and report his conclusions to the Commission on Human Rights, in accordance with his mandate; yet in what is perceived by the plaintiffs to be a hostile move, the defendant spoke and published the alleged defamatory words in the magazine.

Pursuant to this, the plaintiffs filed the writ. The defendant entered conditional appearance and filed a summons under O. 12 r. 7 of the Rules of the High Court 1980, to set aside the writ and/or to strike it out.

There were submission as to whether by so accepting service through his solicitors and entering conditional appearance, the defendant had in fact submitted to the Court's jurisdiction. This would of course be ironic, since the basis of this application to set aside is the plea that there is absence of jurisdiction.

However, that could easily be met with the answer that no submission may be inferred merely from the above course of action taken by the defendant. The plethora of authorities have substantiated this point.

Whilst there is a dearth of the legal definition of the term "expert on mission", the International Court of Justice has pointed out that international practice displays a multitude of activities, increasingly varied in nature, being "missions" for the United Nations within the meaning of Article VI without depending on specific qualifications.

It is common ground that in so far as the defendant is concerned, he is, as a Special Rapporteur to the United Nations, construed and styled as an "expert on mission"

To set the matter in its perspective, it is pivotal to this application to ascertain the extent of the immunity afforded to experts on mission under s. 22 of the Convention. This point was considered by the International Court of Justice (ICJ) in its Advisory Opinion dated 15 December 1989 on the applicability of Article VI, s. 22 of the Convention on the Privileges and Immunities of the United Nations (hereinafter referred to as the "*Mazilu* case.")

It was held by the ICJ, at pp. 196 and 197 that:

> In accordance with the practice followed by many United Nations bodies, the Sub-Commission has from time to time appointed rapporteurs or special rapporteurs with the task of studying specified subjects. These rapporteurs or special rapporteurs are normally selected from among members of the sub-commission. However, over the past ten years, special rapporterus have, on at least three occasions, been appointed from outside the sub-commission. Furthermore, in numerous cases, special rapporteurs appointed from among members of the sub-commission have completed their reports only after their membership of the sub-commission had expired. In any event, rapporteurs or special rapporteurs are entrusted by the sub-commission with a research mission. Their functions are diverse, since they have to compile, analyse and check the existing documentation on the problem to be studied, prepare a report making appropriate recommendations, and present the report to the sub-commission. Since their status is neither that of a representative of a member State nor that of a United Nations official, and since they carry out such research independently for the United Nations, they must be regarded as experts on missions within the meaning of s. 22, even in the event that they are not, or are no longer, members of the sub-commission. Consequently they enjoy, in accordance with s. 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the sub-commission.

This summation drew the line at the degree of the expert's privileges and immunities and this is recounted by Mr. Justice Mohamed Shahabuddeen as follows:

> I accept as accurate Romania's statement "that an expert is not accorded such privileges and immunities anywhere and everywhere:" their functional character clearly excludes so wholesale and undiscriminating an application.

The ICJ's observation in the *Mazilu* case seems to be in accord with contemporary thinking that the doctrine of absolute immunity as established in the long line of authorities such as the *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan* [1975] 1 WLR 1485, *is passe.* In fact, as case laws have shown, what has emerged is that the restrictive theory holds the field.

It was forcefully submitted by Dato' VK Lingam for the plaintiffs that the defendant as a Special Rapporteur only enjoys such privileges and immunities as are necessary for the independent exercise of his functions and that the words spoken and written and acts done by him must be done in the course of the performance of his mission before his immunity can attract.

Thus it was argued that s. 22 and 22(b) drafted as it were, grants not absolute but a qualified and functional immunity borne out of necessity.

The plaintiffs' argument was met by Dr. Cyrus Das's succint appraisal of the situation that one of the basic precepts is that immunity of an official for acts that he performs in his official position is immunity for acts imputable to the organisation, and hence not a privilege of the official but a privilege of the United Nations, established by Art. 2, s. 2 of the Convention (*R v. Madan* [1961] 2 QB 1, and *Dickinson v. Del Solar* [1930] 1 KB 376 etc.).

Whilst recognising that the 'expert' is accorded a narrower range of privileges and immunities as are enjoyed by diplomats and the Secretary-General and the other 'Higher Officers', the immunity is nevertheless an imperative.

It is perhaps banal to state that the principle of diplomatic and consular immunity is deeply-rooted in international law; given the age-old institution of diplomacy with its concomitant privileges and immunities one can only imagine the tenacity of the proponents.

However given also that the expert is empowered for a specific task and on the basis of functional need, a different perspective may be called forth.

The defendant's unwillingness to shed his mantle of immunity seems fortified by the letters from officials of the United Nations in support of his status and performance which is envisaged as being in the course of his mission.

The letters from Georg Mautner-Markhof and Ralph Zacklin were the forerunners of this show of support, culminating in the certificate issued by no less than the Secretary-General of the United Nations himself, Mr. Kofi A. Annan. The certificate reads as follows:

> In connection with the Civil suit No. S3-23-68 of 1996 by MBF Capital Bhd. and MBF Northern Securities Sdn. Bhd. against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.
>
> In accordance with s. 22 of Article VI of the Convention, "experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions ...". Section 22(b) of the Convention further provides that "they shall be

accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind." As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under s. 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Couched as is the Secretary-General's Certificate, in a language which is both vigorous and assertive as regards the defendant's act, deemed to be in the course of his mission and therefore the cloak of immunity never left him, one is left with the question as to what probative value one should accord the said certificate.

Dato' VK Lingam's curt response is that the assertion of immunity had in fact created a 'new' level of immunity not contemplated by the Convention. Counsel looked askance at the Secretary-General's Certificate and questioned the Secretary-General's right to 'determine' that the defendant's act is within his mission, in the absence of any evidence to show how that determination was arrived at.

Dr. Cyrus Das responded that the sanction evident in the Secretary-General's certificate embodies the implicit right to do so, given that there is a right to a waiver.

Dr. Cyrus Das was at pains to draw this Court's attention to the concern and specific reference made to the plaintiff's action in the Secretary-General's certificate and that the Secretary-General had determined that the impugned words spoken by the defendant were spoken in the course of his mission.

It might be relevant now to look at s. 23 of the Convention, which reads as follows:

> Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Both Counsels articulated at length over the implication and effect of the Secretary-General's assertion of immunity. However, at this stage I shall not concern myself with the subtleties and nuances of the equation between waiver versus assertion of immunity under s. 23.

What is in issue is, how should this Court view the Secretary-General's certificate at this stage?

Given that the Secretary-General holds down what is probably one of the most important positions in the World Order today, the certificate issuing from him should not be presumed to be made in cavalier fashion nor be cast aside at will.

However, it stands viewed as an opinion and has no more probative value than a document which appears wanting in material particulars.

It would indeed be a naive supposition if it is to be construed as being conclusive, since can one be heard to say "*Cest fait*" and therefore, that is the end of the matter? Surely not.

It might be asked whether allowing the certificate to hold sway, would in effect, tantamount to subordinating the competence of this Court to deal with any dispute that may arise, although the general notion is that national Courts should not assume the function of arbiters of conflicts such as is evident in this case.

However, soon after the Secretary-General's certificate, came the certificate from the Minister of Foreign Affairs, dated 12 March 1997.

The Minister's certificate was issued pursuant to s. 7 of the International Organisations (Privileges and Immunities) Act, 1992, which reads as follows:

> (1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.

(2) In any proceedings, a certificate given under this section is evidence of the facts certified.

The Minister's certificate in effect endorsed the position of the defendant as a Special Rapporteur and indicated his mandate, or rather in the words of the plaintiffs' Counsel, the extent of that mandate.

The Minister's certificate reads thus:

> I, Datuk Abdullah bin Hj. Ahmad Badawi, Minister of Foreign Affairs, Malaysia by virtue of the power granted to me under s. 7(1) of the International Organizations (Privileges and Immunities) Act 1992 (Act 485) hereby certify that Dato' Param Cumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the Independence of Judges and Lawyers, whose mandate is as follows:
>
> (a) to inquire into any substantial allegations transmitted to him and report his conclusions;
>
> (b) to identify and record not only attacks on the independence of the judiciary, lawyers and Court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;
>
> (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.
>
> Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 Dato' Param Cumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

In more ways than one, the Minister's Certificate triggered a diverse response from both parties.

Dr. Cyrus Das concluded, not unnaturally, that it could only be construed that the Minister had acceded to the Secretary-General's request to accord immunity to the defendant, coming as it did, close on the heels of the Secretary-General's certificate of 7 March 1997.

Dato' VK Lingam resisted that notion and went further to submit that the certificate made no specific reference to the present civil suit at all.

The certificate would appear to be no more than a bland statement as to a state of fact pertaining to the defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation.

The plaintiffs Counsel contended that the certificate is clearly of a functional nature which in practical terms, limits the immunity accorded to the defendant.

In reply, several authorities were brought forth by the defendant to show that the certificate from an Executive (as is the Minister's certificate), should be accepted by the Court as conclusive, for in the words of Lord Cave in *Duff Development Co. Ltd. v. Kelantan Government* [1924] AC:

> ... it is the duty of the Court to accept the Statement of the Secretary of State thus clearly and positively made as conclusive upon the point ...

In *Parlement Belge*, an important statement was made by James LJ, who said:

> ... I apprehend that we should be bound to act on the representation of the Foreign Office ...

And as if in answer to my unspoken thought, Dr. Cyrus Das for the defendant echoed the view of the Court in *Engelke v. Mussman* that:

> ... the Certificate is no attempt on the part of the Executive to interfere with the Judiciary of the country.

Dr. Cyrus Das continued in the same strain, that the Minister's certificate should not be read to be at odds with the certificate of the Secretary-General.

Much argument were canvassed by both parties on the issue of the Minister's Certificate, not least since it is deemed to embody the Executive's stance on the subject.

This Court certainly holds the view that the Minister's certificate, in as much as the Secretary-General's certificate is concerned, was carefully issued and was certainly not born out of caprice.

However, possessed as I am of this knowledge, I am bound to consider the current posture that:

> ... since there are categories of fact of which the Executive had knowledge peculiar to itself it is proper for the Courts to inquire of the Executive in such matters. (B. Sen in his work "*Diplomatic & Consular Privileges*").

Satow in his commentary stated that:

> ... The Court's role in relation to questions of diplomatic immunity has been classified and signified by the guidance on the law provided by the Vienna Conventions. It is still the Court of a country that have the final word in many

cases on who and what are entitled to diplomatic immunity where such questions would be decided by the Court on the basis of domestic law and practice.

A quick look at the cases have shown that the State merely transmits the claim for immunity, leaving it to the Court to examine the truth of the allegation of fact on which it was based.

There were cases where the Courts proceeded to decide the question of immunity without any reference to the Executive, based as it were, on general rules of comity.

Thus, given the differing views expressed, the matter appears to be rather fluid and therefore the question which needs to be addressed, is whether the certificate bears scrutiny?

At the risk of being unwittingly drawn at this stage, into the question of the probative status of both the Secretary-General's and the Minister's certificate, I find that there is compelling ground to resist judicial self-restraint.

So the question whether the defendant's act is within scope or not is an elusive inquiry, to be answered only when matters of evidence is before this Court. Thus in that regard this Court would have to consider the whole context in which the claim against the defendant is made, with a view to deciding whether the relevant act upon which the plaintiffs' claim is based should, in that connection be contemplated as fairly within the area of activity of his mandate or otherwise.

It is of course axiomatic that the defendant's immunity hangs very much on the nature of the act and not on its purpose.

Thus on this fragile premise I shall not venture into anything approaching an analytical inquiry, that is, whether the spoken words are defamatory or not.

I shall merely indicate that I am not shackled by any constraint and so would proceed to state that it is open for me to examine the question whether I have jurisdiction to decide this matter.

Since the nub of the matter is the issue of jurisdiction, it would be useful to define the term. "Jurisdiction" is the right of the Court to enter upon the inquiry as to whether or not a cause of action exist in the plaintiffs' writ and if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief sought.

On the other hand, lack of jurisdiction is the absence of any right in the Court to enter into upon such an inquiry at all.

For a more comprehensive approach to this subject, it would be useful to see when would a properly constituted Court lack jurisdiction? It may lack jurisdiction on four grounds, as clearly indicated by Lord Diplock in *Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong.*

The first ground is:

(1) Because condition precedent to its entering upon the inquiry has not been fulfilled for example a requirement such as existed in some countries that notice be given to the Government before starting an action against it;

(2) Because of the status of one of the parties to the action for example an action brought against a foreign soverign or ambassador who has not consented to the jurisdiction;

(3) Because of the subject matter of the dispute in respect of which the relief is sought, for example a dispute involving the title to foreign land;

(4) Because of the nature of the relief sought, for example an injunction against the Crown.

Lack of jurisdiction may be due to any one or more of those grounds.

It is evident from the above that the position in the present case is based on the second ground.

The position of the defendant is in focus and is pivotal to this application, where it hinges on the defendant's person.

In as much as immunity is imputed to the organisation in cases where officials or experts of the organisation are concerned, it is equally relevant that the person of the defendant determines the fate of his application.

It would therefore appear that whether the defendant as a Special Rapporteur of the United Nations is entitled to so claim immunity would consequently determine whether this Court lacks jurisdiction or otherwise.

Thus for this purpose, I will treat it as if the defendant's summons speaks of the alleged defamation. I shall also assume that if the plaintiffs' action is allowed to proceed, the plaintiffs would be in a position to establish his case.

This is to underpin the importance of distinguishing between the Court's jurisdiction to entertain the plaintiffs' action at all, that is to embark upon the enquiry whether facts exist which would entitle the Court to grant the relief claimed and the accepted practice of the Court to exercise its discretion by

withholding the relief if the facts found to exist disclose a particular kind of factual situation.

The foregoing therefore prompts me to ask myself whether I have the jurisdiction to enter into an inquiry to hear this application.

In addition to the second ground adverted to earlier (i.e. the status of the defendant as 'expert') for this purpose, the question of jurisdiction also takes its colour from the position of the defendant.

Section 23 of the Courts of Judicature Act 1964 invests this Court with jurisdiction since the criterion for residence and place of business, as well as the facts on which the proceedings are based exist, or are alleged to have occurred, are within this Court's jurisdiction.

In that connection it is relevant whether the defendant can now implead that he is immune from due process.

Having regard to the matter in its entirety it is inevitable that I need to postulate that at this interlocutory stage, it is not for me to determine whether the said words imputed to the defendant are defamatory or not. Only the question of jurisdiction looms large.

Towards that end, I must assume that all the allegations as enclosed in the statement of claim are true without deciding it to be so.

To do this I have to see whether the facts placed before me and the relevant laws cited to me oust the jurisdiction of this Court.

It is a fact that the defendant is a Special Rapporteur with the United Nations. It is a fact that he made the statement to the magazine.

Even assuming for a moment that the statement is damning and consequently defamatory, I would have to ascertain whether it would exclude the defendant from the jurisdiction of this Court.

On the first point there is no dispute. Even on the second, the Court's jurisdiction is not ousted even if *Mazilu's* case point otherwise, since the ICJ's decision is not binding on this Court on a point of public international law and in any event, on the facts made available to me at this interlocutory stage, there is no evidence to suggest that the test set out in *Mazilu's* case have been met.

Therefore hackneyed as it may sound, I must reiterate that for purposes of determining jurisdiction I must assume the allegation in the plaintiffs' statement of claim is true and:

Since lack of jurisdiction has the consequence that the Court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the Court to grant to the plaintiff the relief sought, the jurisdiction summons can succeed only if it is shown that no matter what were the facts, that the plaintiff would be able to establish relating to the subject matter of the dispute the Court would have the power to grant relief of the kind sought against the defendant (per Lord Diplock in *Rediffusion (Hong Kong)* [1970] AC.

In the circumstances, I am unable to hold that the defendant is absolutely protected by the immunity he claims.

That does not mean however, that the defendant is estopped from adducing further evidence at trial to support his claim.

If at the end of the trial of the plaintiffs' action, after taking all evidence from the parties, I come to the conclusion that immunity attaches to the defendant, the defendant may succeed at that stage.

All I am deciding for the moment is that on the evidence before me, I have jurisdiction to hear this application and I make the following order:

(1) that the defendant's summons be dismissed with costs; and

(2) that costs are to be taxed and paid forthwith and

(3) that the defendant is to file and serve his defence within 14 days from the date of this order.

Reported by WA Sharif